LE COPY

SUPREME COURT, U. S.
FILED
JUN 10 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

To The United States Court of Appeals
For The Fifth Circuit

THOS. H. LAW
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102
Attorneys for Respondent

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone 332-4070

SUBJECT INDEX

Page

PRELIMINARY STATEMENT 1

THE FACTS 2

The Hypothesis On Which Petitioner's Argument is Based is Supported By Neither a Jury Finding Nor The Evidence 2

Connecticut General in Fact Did Not Have The Knowledge Petitioner Asserts 3

A. Mr. Beck's fraud in failing to reveal his long history of bad health 3

B. Mr. Beck's "minor gastritis flareup" 4

THE LAW 7

Good Health Being a Condition Precedent To a Life Insurance Policy's Becoming Effective, Waiver And Estoppel Cannot Enlarge The Risks Covered And Thus Create a New Contract 7

There Was No "Waiver By Election Of Defenses" In The Case At Bar 13

CONCLUSION AND PRAYER 17

CERTIFICATE OF MAILING 17

LIST OF AUTHORITIES

Page

American Employers' Ins. Co. v. Brock,
Tex.Civ.App., 215 SW2d 370, 375 15
American Nat. Ins. Co. v. Jarrell
(Tex.Civ.App.) 50 SW2d 875 8
American National Insurance Company v. Lawson,
127 SW2d 294, 295 (Tex.Comm.App., 1939) 7
American National Ins. Co. v. Melton
(Tex.Civ.App.) 29 SW2d 795 8
American Nat. Life Insurance Company v. Corley Co.,
73 SW2d 598 7

C. E. Carnes & Co. v. Employers' Liability Assur.
Corporation, 5 Cir., 101 F2d 739 9

Denton v. Kansas City Life Ins. Co.
(Tex.Civ.App.) 231 SW 436 8

Galveston County v. Hartford Fire Ins. Co.,
Tex.Civ.App., 231 SW2d 684 15
Great American Accident Insurance Company v.
Roggen, 144 SW2d 1115 (Tex.Civ.App.-
Galveston 1940, no writ) 14
Great American Insurance Company v. Mitchell,
335 SW2d 707 (Tex.Civ.App.-
San Antonio 1960, writ ref.) 8

Hassell v. Commonwealth Casualty & Ins. Co.,
184 SW2d 917, 919 (Tex. 1945) 12

Lee v. Mutual Protective Ass'n. of Texas,
47 SW2d 402 (Tex.Civ.App.-1932, writ dism'd) 12
Legal Security Life Ins. Co. v. Erwin, 372
SW2d 750 (Tex.Civ.App.-1963, writ ref'd n.r.e.) 12
Liverpool & London & Globe Ins. Co. v. Ende,
65 Tex. 118, (Tex. 1885) 10

Massachusetts Bonding & Insurance Co. v.
Dallas Steam Laundry and Dye Works,
Tex.Civ.App., 85 SW2d 937 9
Mims v. Houston Fire & Casualty Co., 362 SW2d
880 (Tex.Civ.App. 1962, no hist) 10

LIST OF AUTHORITIES (Continued)

Page

National Aid Life Ass'n. v. Murphy, 78 SW2d 223 (Tex.Civ.App.-Dallas 1934, writ dism'd) 11, 14, 15

Ofield v. National Ben. Life Ins. Co. (Tex.Civ.App.) 293 SW 271 8

Powell v. American Casualty & Life Company, 250 SW2d 744, (Tex.Civ.App.-Dallas 1952, error ref., n.r.e.) 9

Republic Ins. Co. v. Silverton Elevators, Inc., 477 SW2d 336, (Tex.Civ.App., Feb. 14, 1972, Rehearing denied March 13, 1972, Application for writ of error pending) 12

Scott v. Industrial Life Insurance Company, 411 SW2d 769 (Tex.Civ.App.-Dallas 1967, no writ) 14

Southern Surety Co. v. Benton (Tex.Com.App.) 280 SW 551 8

Southern Underwriters v. Jones, 13 SW2d 435 (Tex.Civ.App.-1929, writ ref'd) 10

Terry v. Texas Prudential Ins. Co., 77 SW2d 761 (Tex.Civ.App. 1934, writ dism'd) 12

Texas Prudential Ins. Co. v. Dillard, 307 SW2d 242, 252 (Tex. 1957) 12

Travelers Indemnity Company v. Holman, 330 F.2d 142, 144 (5th Cir., 1964) 9

Vaught v. Texas Employers' Ins. Ass'n, Tex.Civ.App., 257 SW2d 445 9

Washington Nat. Ins. Co. v. Craddock, 130 Tex. 251, 109 SW2d 165, 113, A.L.R. 854 9

White v. Great American Reserve Insurance Company, 342 SW2d 793 (Tex.Civ.App.-Dallas, 1961, no writ hist.) 9

Wright v. Federal Life Insurance Co. (Tex.Com.App.) 248 SW 325 8

STATUTES AND OTHER AUTORITIES

Page

Annotation at 1 A.L.R.3d 1139 10
Annotation at 113 A.L.R. 857 9
Annotation at 163 A.L.R. 691 9

29A Am. Jur., Insurance, §1135 9

Federal Rules of Civil Procedure, Rule 15 16

24 Tex. Jur. 691 8
32 Tex.Jur. 2nd Insurance, Sec. 160, Page 722 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1497

LORETTA FAY BECK, *Petitioner*

v.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

To The United States Court of Appeals
For The Fifth Circuit

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, Connecticut General Life Insurance Company, prays that the Petition for Writ of Certiorari sought by Loretta Fay Beck, Petitioner, be denied. The record before this Honorable Court does not bring this case within the purview of Rule 19, Supreme Court Rules. There is no "special and important reason" for a review of writ of certiorari of the decision of the Court of Appeals. Petitioner does not even contend that the Court has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, has decided an important question of federal law not heretofore decided or has

decided a federal question in a manner which conflicts with applicable decisions of this Court. Nor has the Fifth Circuit here "decided an important state question in a way conflicting with applicable state law," the only remaining reason, under Rule 19, for a review by this Court on writ of certiorari. Petitioner characterizes the Court's opinion as "patently absurd" (Br. 5) and its statements therein as "bizarre" (Br. 5) and "utter nonsense" (Br. 8), but the fact is that the Fifth Circuit merely followed the Texas law established by a generation of cases.

THE FACTS

The Hypothesis On Which Petitioner's Argument is Based is Supported By Neither a Jury Finding Nor The Evidence

It is uncontroverted that the insured, Jerry D. Beck, was not in good health at the time his life insurance policy was delivered. The jury so found (R. 526, 527) and Petitioner so admits. (Br. 3) Petitioner's insistence that the fact of bad health was waived is wholly dependent on the validity of her assumption, stated at page 3 of her brief, that:

> "Connecticut General had *knowledge* of Beck's illness prior to the time the policy was delivered and prior to the time it collected the full premiums." (Emphasis by Petitioner)

This statement — the hypothesis on which Petitioner's argument rests and without which her case must fall — is in error. There is no such jury finding, nor could there have been under the facts.

The jury issue upon which Petitioner apparently relies to show knowledge is Question No. 8. This question does not inquire as to whether Connecticut General had knowledge of the state of Beck's health at the time of the delivery of the policy. Rather, it asks whether before Beck's *death*, Connecticut General had knowledge of such facts as would *by a reasonably diligent investigation have disclosed* that Beck was not in good health in time for the company to have requested the return of the policy during Beck's lifetime. This is certainly not a finding of knowledge, much less knowledge prior to delivery.

Connecticut General in Fact Did Not Have The Knowledge Petitioner Asserts

A. Mr. Beck's fraud in failing to reveal his long history of bad health

Respondent not only did not know that Mr. Beck was not in good health prior to the time the policy was delivered. As a result of the fraud practiced by Mr. Beck, it had no reason even to be suspicious.

Although Mr. Beck had experienced intermittent pain and numbness in his limbs and discoloration of his arm and hand for some two years prior to the time he applied for insurance with Respondent, he did not reveal these facts. He failed to disclose his admission to St. Joseph Hospital, as well as an arteriogram taken at St. Joseph. He did not tell the insurance company examining physician that an amputation of his right leg had been advised by his doctor but that he

had refused the amputation. He hid the fact that he had been treated by a Dr. Morris Hill and later by a Dr. Gaston Machado and the further fact that both of these doctors had prescribed vasodilators. He did disclose the name of Dr. R. W. Hall, his family physician, but failed to note that Dr. Hall had ever treated him for vascular problems. (R.23, 104-114)[1]

Yet Mr. Beck was well aware of all these pertinent facts. Though he hid them from the insurance company when he was trying to get his policy approved, he readily gave his history to his treating physician, Dr. Donald Lee Eakin, when he was admitted to Hurst General Hospital just 13 days later, before the delivery of the policy. Nor did he reveal them when the policy was delivered. (R. 452-454) Approximately one month and nine days after such delivery, he suffered a coronary occlusion which resulted in his immediate death. (Def. Ex. 1, 2)

B. Mr. Beck's "minor gastritis flareup"

Petitioner would have this Court believe that correspondence in the home office file showed Connecticut General's actual knowledge of Beck's illness. The correspondence in question was admitted in evidence as Plaintiff's Exhibits 14 and 17, in the trial record

[1]Four doctors testified at the trial that knowledge of Mr. Beck's treatment at St. Joseph Hospital in 1966 would have caused them to increase the premium to be charged for writing a life insurance policy on his life. (R. 250-251, 253-255, 279, 283-285, 94, 332-333) They all went on to testify that knowledge of the subsequent problems such as numbness and discoloration of both the right foot and left arm and the continued treatment with vasodilators, would have caused them to completely reject the risk regardless of the premium. (R. 251-252, 255, 280, 285-286, 331-335)

before the Fifth Circuit. This correspondence shows that Connecticut General was informed only that Beck had entered the hospital for a "minor gastritis flare-up" which was considered insignificant since his gastric problem had already been taken into account on the original premium rating. Plaintiff's Exhibit 17 specifically states that, "on September 19 or 20, Mr. Beck entered the hospital with what the agent understood to be an attack of gastritis." There is indeed scant basis for the assertion that Joseph Snelus, the soliciting agent, was privy to the "knowledge" which Petitioner attributes to him. Certainly, if he did have any such knowledge, Mr. Snelus was not passing it on to his superiors.

As shown by the record:

1. Mr. Beck called Snelus sometime around the end of September, 1968, for the purpose of initiating a possible claim under a disability income policy. Beck informed Snelus that he had been in the hospital and that "he thought he had eaten some pizza and it had made him sick or something, and they had taken him to the hospital and run some tests, and that the doctor had given him some medication." (R. 432)

2. Snelus testified at this point that the medication "was in some way connected with dilating his blood or vessels or something." (R. 432) On cross-examination, Snelus admitted that he did *not* recall whether it was *before* or *after* delivery of the policy that he learned that Beck was going to have some tests run. (R 450)

3. Beck told Snelus that he had been given "a clean bill of health" and Snelus admitted that "he had no reason to believe otherwise." (R. 452)

4. On or about October 7, 1968 the policy insuring his life was delivered to Beck. On October 29, he was again admitted to the hospital for a complete series of tests in the cardiovascular unit. These tests showed once more the occlusion of the left axillary artery, as well as a fifty percent obstruction of the main artery going to the right arm. (R. 310) Mr. Beck was released from the hospital on November 6. On November 16, he died of "coronary occlusion due to arteriosclerosis." (Def. Ex. 1)

The Fifth Circuit did not in its opinion find it necessary to discuss the facts of the case, holding that as a matter of law Petitioner was not entitled to recover even under the assumptions indulged by Petitioner. The facts as they appear in the record are set forth briefly hereinabove to demonstrate the true state of Mr. Beck's health and the falsity of Petitioner's premise of "knowledge." Obviously, if there were no knowledge on the part of Respondent (as there was not), there is no factual basis for waiver.

But even had there been knowledge, the Texas cases have consistently held that good health is a condition precedent to a life insurance policy's becoming effective and that, absent good health, there is no *legal* basis for waiver regardless of *factual* considerations. Since the insured was not in good health at the time he applied for the policy or at the time the policy

was delivered, it never became effective and so there was nothing to waive, no act on the part of the insurance company to estop it. This was the basis of the holding by the Fifth Circuit.

THE LAW

Good Health Being a Condition Precedent To a Life Insurance Policy's Becoming Effective, Waiver And Estoppel Cannot Enlarge The Risks Covered And Thus Create a New Contract

The law on waiver and estoppel as applied to *life* insurance is succinctly stated in two cases bearing the stamp of approval by the Supreme Court of Texas. "The stipulation in the policy sued on to the effect that no obligation is assumed by the company unless the insured be in sound health at the date of the policy, should be construed as a condition precedent to the policy's becoming effective." *American National Insurance Company v. Lawson*, 127 SW2d 294, 295 (Tex.Comm.App., 1939, opinion by Judge Hickman—later Chief Justice—adopted as the opinion of the Supreme Court). Indeed, it even is immaterial whether the proposed insured knew of his condition or not. In *Lawson* the Court adopted as its statement of the Texas law, the following language from *American Nat. Life Insurance Company v. Corley Co.*, 73 SW2d 598:

> "It is now well settled in this state that a stipulation in a life insurance policy that such policy shall not take effect unless the insured is in sound health at the date the policy is de-

> livered is, unless restrained by some statute, valid and enforceable, and it is immaterial whether the insured know of his condition in that respect or not. His good faith in believing that he was in sound health at the time the policy was delivered will not authorize a recovery if in fact at the time of the delivery of the policy he was suffering from an ailment of a substantial nature which continued and ultimately caused his death. 24 Tex.Jur. 691; Wright v. Federal Life Insurance Co. (Tex.Com.App.) 248 S.W. 325; Southern Surety Co. v. Benton (Tex.Com.App.) 280 S.W. 551; American National Ins. Co. v. Melton (Tex.Civ.App.) 29 S.W.2d 795; American Nat. Ins. Co. v. Jarrell (Tex.Civ.App.) 50 S.W.2d 875; Ofield v. National Ben. Life Ins. Co. (Tex. Civ.App.) 293 S.W. 271; Denton v. Kansas City Life Ins. Co. (Tex.Civ.App.) 231 S.W. 436." At page 295.

Subsequently the Texas Supreme Court again expressly placed its stamp of approval on a similar statement of the law by noting "writ refused" on *Great American Insurance Company v. Mitchell*, 335 SW2d 707 (Tex.Civ.App.-San Antonio 1960, writ ref.). There the policy provided that coverage should cease at age 65. The insurance company continued to accept the premiums tendered after the insured reached age 65 and the trial court held that by accepting the premiums, the company had waived the age requirement and was estopped to claim that condition as a defense. In reversing and rendering the case, the opinion by Judge Jack Pope (now one of the most respected justices on the Texas Supreme Court) pointed out that the Texas law on this point

is settled. Waiver and estoppel do not apply to a condition of coverage.

> "Plaintiff's claim and recovery run directly contrary to the settled Texas law of waiver and estoppel with respect to risks designated in an insurance policy. Waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel can not create a new and different contract with respect to risks covered by the policy. This has been the settled law of Texas since the decision in Washington Nat. Ins. Co. v. Craddock, 130 Tex. 251, 109 S.W.2d 165, 113 A.L.R. 854. See also, Vaught v. Texas Employers' Ins. Ass'n, Tex.Civ.App., 257 S.W.2d 445; Powell v. American Casualty & Life Co., Tex.Civ.App., 250 S.W.2d 744; Massachusetts Bonding & Insurance Co. v. Dallas Steam Laundry and Dye Works, Tex.Civ.App., 85 S.W.2d 937; C. E. Carnes & Co. v. Employers' Liability Assur. Corporation, 5 Cir., 101 F.2d 739; 29A Am. Jur., Insurance, §1135; 163 A.L.R. 691; 113 A.L.R. 857." At page 708.

The holding in the *Mitchell* case has been recognized by the Fifth Circuit as "a principle of Texas law . . . binding . . . upon us" in *Travelers Indemnity Company v. Holman*, 330 F.2d 142, 144 (5th Cir., 1964). See also *Powell v. American Casualty & Life Company*, 250 SW2d 744, (Tex.Civ.App.-Dallas 1952, error ref., n.r.e.) and *White v. Great American Reserve Insurance Company*, 342 SW2d 793 (Tex.Civ.App.-Dallas, 1961, no writ hist).

An annotation of the question here presented appears at 1 A.L.R.3d 1139. The rule is summarized at Section 11, page 1159 as follows:

> "The sound health requirement of a life, accident, or disability policy is ordinarily held not subject to the doctrines of waiver or estoppel."

Petitioner has chosen to ignore these clear expressions by the Texas Supreme Court which set forth the law as to *life* insurance cases. Instead, she cites numerous cases involving *property* insurance. Thus, she tells this Court that "the doctrines of waiver and estoppel have been *consistently* applied against insurance companies in Texas for a century" (Br. 4, emphasis by Petitioner), citing *Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118, (Tex. 1885). In further support of her contention she cites such cases as *Southern Underwriters v. Jones*, 13 SW2d 435 (Tex.Civ.App.-1929, writ ref'd) and tells the Court that it "is one of *fifty* (sic) authorities cited in 1962 in *Mims v. Houston Fire & Casualty Co.*, 362 S.W.2d 880 (Tex.Civ.App. 1962, no hist) for the proposition that the doctrines [of waiver and estoppel] will be applied. . . ." Petitioner neglects to inform the Court that these, too, are fire and property insurance cases, not involving life insurance. They have no application to the life insurance case before the Court.

There is a clear distinction between property insurance and life insurance, both as to underwriting techniques and the law governing underwriting. The basic distinction is stated at 32 Tex.Jur. 2nd *Insurance*, Sec. 160, Page 722, as follows:

> "With reference to contracts for life insurance, agents do not have power to conclude oral agreements for temporary or other character of insurance, but they merely take applications and collect premiums and forward same to their companies for approval and acceptance. In the case of insurance on property, however, a general agent, authorized to receive applications, accept or reject risks, receive premiums, and issue and deliver policies, has authority to enter into a valid contract of insurance."

The basis for the decision in the instant case is that waiver and estoppel cannot create a contract. If Connecticut General's agents were authorized to create contracts, as is the case with most property insurance agents, this matter would never be in its present posture.

Petitioner asserts that the Fifth Circuit "admits that its decision is in conflict with five Texas decisions — three cited in the margin of its original Opinion and two cited in the Opinion on Rehearing" and berates as "utter nonsense" the statement by the Court that "To the extent that the cases cited in the margin would support appellee's position they have been overruled by the above cited cases." Petitioner apparently has overlooked the fact that the statement by the Fifth Circuit is prefaced with the phrase "*To the extent* that the cases cited in the margin would support appellee's position. . ." (emphasis supplied) and therefore that Court does not, as Petitioner asserts, "admit that its decision is in conflict with the cases cited." In fact, it is not. Although Petitioner points out that *National Aid Life Ass'n. v. Murphy*,

78 S.W.2d 223 (Tex.Civ. App. 1934, writ dism'd) has been cited by the Texas Supreme Court in *Texas Prudential Ins. Co. v. Dillard*, 307 S.W.2d 242, 252 (Tex. 1957), the citation was on an altogether different point. The same is true of *Terry v. Texas Prudential Ins. Co.*, 77 S.W.2d 761 (Tex.Civ. App. 1934, writ dism'd), which Petitioner finds cited by the Supreme Court of Texas in *Hassell v. Commonwealth Casualty & Ins. Co.*, 184 S.W.2d 917, 919 (Tex. 1945). The third case mentioned by Petitioner *(Southern Underwriters v. Jones, supra)* is the fire insurance case referred to hereinabove.

In short, the cases cited by Petitioner fall into the categories of fire and property insurance (e. g., *Republic Ins. Co. v. Silverton Elevators, Inc.*, 477 S.W. 2d 336, (Tex.Civ.App., Feb. 14, 1972, Rehearing denied March 13, 1972, Application for writ of error pending); *Ende, supra; Jones, supra; Mims, supra);* or merely cite earlier cases on points of law not pertinent (e. g., *Dillard, supra;* and *Terry, supra);* or are cases where the insured had accurately stated the facts showing bad health but the insurance company representative had deliberately changed the application to hide this fact (e. g., *Lee v. Mutual Protective Ass'n. of Texas*, 47 S.W.2d 402 (Tex.Civ.App.-1932, writ dism'd); *Terry, supra);* or the insured's physical complaint did not in fact constitute "bad health" in the sense used in the policy (e.g., *Legal Security Life Ins. Co. v. Erwin*, 372 S.W.2d 750 (Tex. Civ.App.-1963, writ ref'd. n.r.e).

There Was No "Waiver By Election Of Defenses" In The Case At Bar.

Petitioner devotes a single page of her brief to her "Rule Two: Waiver By Election of Defense." Though she asserts the existence of this rule, nowhere does she assert that it applies to the case at bar. Nor does it have any such application.

As shown by the record, on June 24, 1969, Respondent's Assistant Claims Manager, Mr. Selig, wrote Petitioner's attorney denying Mrs. Beck's claim on grounds the policy was issued at a time when the company was not aware of the "extent and seriousness of Mr. Beck's medical history." (Def. Ex. 18, Tr. 332). The last paragraph of this letter goes on to state:

> "Nothing in this letter should be construed as a waiver of any of Connecticut General's rights or defenses under the above mentioned policies, and all of these rights and defenses are reserved to the company, whether or not specifically mentioned herein."

Mr. Atkins then wrote Mr. Selig (Pl. Ex. 30, Tr. 417) inquiring what the company meant by "the extent and seriousness of Mr. Beck's medical history," and asking what Mr. Selig intended by saying that nothing in his letter should be considered "as a waiver of any of Connecticut General's rights or defenses." Mr. Selig's reply is dated August 19, 1969. (Pl. Ex. 31, Tr. 418) The next to last paragraph of that letter states:

> "We are very sorry that a more favorable decision could not be made on this claim. Of course,

> you understand that nothing in this letter should be construed as a waiver of the company's rights or defenses under the above captioned policies, and all of these rights and defenses are reserved to the company, whether or not mentioned herein. The last sentence is our standard reserve clause in answer to your question regarding a similarly worded statement in my previous letter."

In *Great American Accident Insurance Company v. Roggen*, 144 SW2d 1115 (Tex.Civ.App.-Galveston 1940, no writ), the Court held that statements such as those contained in both of Mr. Selig's letters are sufficient to avoid any questions of waiver or estoppel as to a company's defenses. The Court quoted the rule of waiver as stated in *National Aid Life Ass'n. v. Murphy*, 78 SW2d 223, 227 (Tex.Civ.App.-Dallas 1934, writ dism'd) and then went on to state:

> "We are constrained to hold that the rule just referred to does not apply to the facts found by the court, because, as appears from the letter, the insurance company in effect stated that it was waiving no grounds which it had for not paying the claim. The intention to waive grounds of defense, which are not expressly stated, cannot be implied against the express statement that such grounds are not waived."

In order to invoke the rule stated in the *Murphy* case the insured must show that the company set out its specific ground for denial at a time when it had knowledge of all facts necessory for assertion of any remaining defenses. This contention was not raised by Petitioner at trial, and no jury issues concerning

these matters were requested by Petitioner. Not only does Petitioner have the burden to obtain a finding in the trial court, but she has the additional burden of showing that she acted on the company's denial as announced and that she incurred expenses, or loss, or detriment in consequence thereof. There has been no showing of such reliance and detriment. It is difficult to imagine that Petitioner would have dropped her claim, and thus have saved the expense and trouble of a suit, had Connecticut General simply added that, in addition to misrepresentation, the claim was being denied because Mr. Beck was not in good health at the time the policy was delivered.

The question of reliance was raised in *Scott v. Industrial Life Insurance Company*, 411 SW2d 769 (Tex.Civ.App.-Dallas 1967, no writ). The Court states at page 772:

> "It is true, as now contended by appellant in his brief, that our courts have recognized the rule of law to the effect that where one specific ground of forfeiture is urged against a policy of insurance, and the validity thereof denied on that ground alone, all other grounds are considered waived. However, this rule is modified to the effect that it is inapplicable where the insured has not acted upon the company's position of denial as announced and has not incurred expense or loss or detriment in consequence thereof." (Citing National Aid Life Ass'n v. Murphy, Tex.Civ.App., 78 S.W.2d 223, 227; American Employers' Ins. Co. v. Brock, Tex.Civ.App., 215 S.W.2d 370, 375; Galveston County v. Hartford Fire Ins. Co., Tex.Civ.App., 231 S.W.2d 684)

And regardless of the foregoing, Petitioner's argument fails in light of Rule 15, Federal Rules of Civil Procedure, which provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The good health defense was, in fact, raised by the pleadings, being asserted in Defendant's First Amended Original Answer which was filed with an order granting leave to file. No objection thereto was even raised by Petitioner. Thereafter, at time of trial the issue concerning good health was submitted to the jury without objection, and Petitioner's attorney was allowed to submit issues concerning estoppel and waiver.

CONCLUSION AND PRAYER

Because the judgment of the Court of Appeals is eminently correct and the Petition for Writ of Certiorari does not present matters of sufficient consequence to warrant this Court's review of this case on certiorari, Respondent, Connecticut General Life Insurance Company, respectfully prays that the Petition for Writ of Certiorari be denied.

THOS. H. LAW
Attorney for Respondent

Thos H. Law

Of Counsel:
LAW, SNAKARD, BROWN & GAMBILL
1500 Fort Worth National Bank Bldg.
Fort Worth, Texas 76102

CERTIFICATE OF MAILING

I, Thos. H. Law, attorney of record for Respondent, do hereby certify that the foregoing Reply has been served upon Petitioner, Loretta Fay Beck, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to her attorney of record, Mr. Bill Atkins, P. O. Box 248, 407 Arlington Bank & Trust Building, Arlington, Texas 76010, on this 7 day of June, 1972.

Thos. H. Law